Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

JUDHISTIR PATRO (JUDGMENT-DEBTOR) *v.* NOBIN CHANDRA KHELA (DECREE-HOLDER).* 1886 *February* 11.

Limitation—Execution of Decree—Decree payable by Instalments—Instalment Decree—Option to execute—Waiver—Construction of Decree.

Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case.

On an application for execution of a decree made payable by instalments, *held* that the application was barred by limitation, on the ground that the judgment-creditor should have applied for execution within three years from the date of the first default in payment.

THIS was an application for execution of a decree which had been drawn up in accordance with a compromise come to between the plaintiff and the defendant. The decree directed payment of the amount due by instalments, namely Rs. 50 in Magh 1289 *(Vilaity)*; Rs. 100 in Phalgoon 1290; Rs. 65 in Magh 1291; and Rs. 60 in Magh 1292 (January-February 1885.) The decree declared that on failure to pay any one instalment the agreement for payment by instalments should come to an end, and the whole sum should become due and payable with interest at 12 per cent.

The decree-holder, whose application for execution was made in April 1885, stated that the judgment-debtor had paid the first instalment, but had made default in payment of the remaining instalments, and he prayed for execution for Rs. 225 with interest from the due date of the second instalment. The judgment-debtor denied that he had paid any of the instalments, and he pleaded that the application was barred by limitation.

The lower Courts found as a fact that the judgment-debtor had not paid any of the instalments, but they held the application not barred by execution on the authority of *Nilmadhub*

* Appeal from Appellate Order No. 367 of 1885, against the order of R. Towers, Esq., Judge of Midnapur, dated the 14th of August 1885, affirming the order of Baboo Purno Chunder Chowdhury, Second Munsiff of Tumluk, dated the 5th of May 1885.

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JUDHISTIR PATRO v. NOBIN CHANDRA KHELA.

Chuckerbutty v. *Ramsody Ghose* (1). The judgment-debtor appealed to the High Court.

Baboo *Horendra Nath Mookerjee*, for the appellant.

No one appeared for the respondent.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—No appearance has been made before us on behalf of the respondent in this case. We have been obliged to hear the appeal *ex parte*.

The case is one not of an uncommon character. A decree was passed providing for payment by instalments. It provided that, on failure to pay any one instalment, the debtor should become liable to have the whole decree executed at once at a particular rate of interest therein mentioned.

This was an application made for the execution of the whole decree with interest at the rate provided for in that decree.

The Courts below appear to have held that default was made in the very first instalment, which was to have been paid in Magh 1289; and they have ordered execution in respect of the subsequent instalments, which were not barred, it being admitted that the first instalment was barred.

It is contended for the judgment-debtor, who is the appellant before us, that the application for execution was barred by limitation. It is argued that there was no option to waive the right to realize the whole amount of the decree upon the first default, and that as the decree-holder had not done so, and as he did not bring this application within three years of the first default, the application was barred.

The Courts below relied upon a decision of this Court in *Nilmadhub Chuckerbutty* v. *Ramsody Ghose* (1). It was there held that, as the decree-holder had the option, on default of payment of any one instalment, to execute the whole decree, and did not exercise that option but received instalments due subsequent to the default, he must be considered to have waived his right to execute the whole decree. The Judges who decided that case decided it upon the terms of the decree before them. Having

(1) I. L. R., 9 Calc., 857.

regard to the terms of the decree in this case we think that the ruling in *Nilmadhub Chuckerbutty* v. *Ramsody Ghose* (1) relied upon by the Courts below, is not applicable. Here the decree distinctly provides that, upon failure to pay any one instalment, the agreement for payment by instalments shall be cancelled and the decree-holder shall thereupon realize the whole decree, and shall also obtain from the judgment-debtor interest at a certain specified rate. The decree-holder in the present instance does not profess to have waived his claim, for he seeks to realize the whole decree, and he also claims interest at the rate stipulated. He therefore seeks to take advantage of the provisions of the decree. He must, we think, be also bound by any disability which may arise upon a proper construction of that decree. Upon the terms of the decree we think that he had no option to waive his right to execute it for the whole amount; and, having neglected to take advantage of the privilege given in that decree, he is now too late to realize anything.

We accordingly allow this appeal, set aside the orders of the Courts below, and dismiss the application, with costs in this Court and the lower Courts.

P. O'K. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

DWARKA NATH RAI AND OTHERS (PLAINTIFFS) *v.* KALI CHUNDER RAI AND OTHERS (DEFENDANTS).*

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Co-sharers—Notice to Quit—Co-sharers, Suit by—Withdrawal of one co-sharer from the suit—Ejectment.

Where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for the recovery of the land, the fact that one of the plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.

* Appeal from Appellate Decree No. 749 of 1885, against the decree of Baboo Mati Lal Sarkar, Subordinate Judge of Dacca, dated the 26th of January 1885, reversing the decree of Baboo Ram Chunder Dhur, Second Munsiff of Manickgunge, dated the 22nd of December 1883.

(1) I. L. R., 9 Calc., 857